The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies

U.S. Small Business Administration
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FOREWORD

This guide to the Regulatory Flexibility Act has been written to help regulatory staff and federal agency economists understand the purposes of the law, the requirements of the law, and the role of the U.S. Small Business Administration's Office of Advocacy in the regulatory process.

This guide is not the definitive interpretation of the law. Ultimately, each agency must interpret the law within the context of its mission and enabling legislation. Until such time as a body of case law on the Regulatory Flexibility Act develops, the Office of Advocacy offers this guide to help federal agencies determine what is required under its provisions.

In drafting the guide, the Office of Advocacy has endeavored to distinguish between what is required by the Regulatory Flexibility Act and what the Office of Advocacy considers desirable practices and processes under the Act. In this effort, the Office of Advocacy's motivation is to make the process more informative and useful for decision-makers, not more burdensome.

The Office of Advocacy is grateful to the federal agencies that provided detailed comments in response to earlier draft versions of this guide. Their suggestions and recommendations have been incorporated as appropriate.

CONTENTS

ABBREVIATIONS

APA	Administrative Procedure Act
CBO	Characteristics of Business Owners survey
EIS	environmental impact statement
EPA	Environmental Protection Agency
FRFA	final regulatory flexibility analysis
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
NEPA	National Environmental Policy Act
NOAA	National Oceanographic and Atmospheric Administration
NPRM	Notice of Proposed Rulemaking
OIRA	Office of Information and Regulatory Affairs, OMB
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
RFA	Regulatory Flexibility Act of 1980
RIA	regulatory impact analysis
SBA	U.S. Small Business Administration
SBREFA	Small Business Regulatory Enforcement Fairness Act of 1996

INTRODUCTION

The Regulatory Flexibility Act of 1980 (RFA)[1] applies to a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

The major purpose of the RFA is to establish as a principle of regulatory issuance that federal agencies endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of entities subject to the regulation. To achieve this principle, federal agencies are required to:

- solicit and consider flexible regulatory proposals; and
- explain the rationale for their actions to assure that flexible regulatory proposals are given serious consideration.

Some of the reasons Congress passed the RFA include:

- regulations designed for large entities are imposed on small entities without consideration as to whether small entities contribute to the problems that give rise to the need for regulation;
- uniform compliance requirements impose disproportionate burdens on small entities;
- differences in the scale and resources of regulated entities adversely affect competition, innovation, and productivity, and create market-entry barriers;
- alternative regulatory approaches may exist that can minimize the significant impact of rules on small entities without conflicting with the objectives of proposed regulations; and
- regulatory reform is needed in regulation development to solicit the ideas and comments of small entities to examine the impact of proposed and existing rules on those entities.

[1] Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601).

The RFA does not seek preferential treatment for small entities, require agencies to adopt regulations that impose the least burden on small entities, nor mandate exemptions for small entities. Rather, the RFA encourages agencies to examine public policy issues using an analytical process that identifies, among other things, barriers to small business competitiveness; and seeks a level playing field for small entities, not an unfair advantage.

In essence, the RFA asks agencies to be cognizant of the economic structure of the entities they regulate and the effect their regulations may have on small entities. To this end, the RFA requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.

Amendments to the Regulatory Flexibility Act

In June 1995, the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) was introduced in the Senate as S. 942 to address some of the deficiencies of the RFA that had been identified in previous oversight hearings — namely, the lack of judicial review of agency actions under the RFA and a history of uneven agency compliance with the act. The bill was amended, passed by Congress, and signed into law by President Clinton on March 29, 1996.[2]

The SBREFA contains several significant amendments, including:

- judicial review of agency compliance with some of the RFA's provisions;
- requirements for more detailed and substantive regulatory flexibility analyses; and
- expanded participation by small entities in the development of rules by

[2] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601 et seq. (1996)).

the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA).

OVERVIEW OF THE REGULATORY FLEXBILITY ACT

The RFA imposes three significant regulatory processes on agencies. When there is a significant economic impact on a substantial number of small entities, the RFA requires agencies to:

1. review existing rules periodically;
2. publish a semi-annual agenda of planned regulatory activities; and
3. prepare and publish analyses that examine the economic impacts on small entities of proposed (and final) rules and regulatory alternatives.

The first two processes are described here briefly. The third process, although summarized here, is the primary focus of this guide and is discussed in greater detail in the sections that follow this overview.

Periodic Review of Existing Rules

Section 610 of the RFA requires agencies to review all regulations that have a significant economic impact on a substantial number of small entities within 10 years of their adoption as final rules. The purpose of the review is to assess the impact of existing rules on small entities and to determine whether the rules should be continued without change, amended, or rescinded (consistent with the objectives of applicable statutes) to minimize impacts on small entities.

Each year, agencies must publish in the *Federal Register,* and solicit public comments on, a list of the rules that have a significant economic impact on a substantial number of small entities that will be reviewed under the RFA during the succeeding 12 months. The list must briefly describe each rule and the need and legal basis for the rule. At a minimum, individual rules that have a significant economic impact on a substantial number of small entities are required to be reviewed 10 years after promulgation. Rules promulgated prior to 1980 were required to be reviewed by January 1, 1991. Agency compliance with section

610 of the RFA is subject to judicial review.

In reviewing rules to minimize impacts on small entities, agencies must consider the following:

- the continued need for the rule;
- the nature of complaints or comments received concerning the rule from the public;
- the complexity of the rule;
- the extent to which the rule overlaps, duplicates, or conflicts with other federal rules and, to the extent feasible, with state and local governmental rules; and
- the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed since adoption of the rule.

Office of Advocacy Comment: In addition to complying with these statutory requirements, the Office of Advocacy encourages agencies to involve and consult with small entities during the review process to ascertain recent industry developments. Small entities can be a major resource and provide valuable insights into regulatory impacts and improvements needed in agency rules. Federal agencies may also find it helpful to coordinate this review process with the preparation of their semi-annual regulatory agenda.

Semi-Annual Regulatory Agenda

In April and October of each year, federal agencies are required to publish a regulatory agenda in the *Federal Register* listing all rules under development that are expected to have a significant economic impact on a substantial number of small entities.

Significantly, Section 602(c) of the RFA requires agencies to endeavor to either provide direct notification of the agenda to small entities or their representatives inviting comments on each subject area in the agenda, or to

publish the agenda in publications likely to be received by small entities.[3]

Section 602(a)(1)–(3) states that the regulatory agenda must contain the following:

- a brief description of the subject area of any rule the agency expects to propose or promulgate that is likely to have a significant economic impact on a substantial number of small entities;
- a summary of the nature of each such rule for each subject area, the objectives and the legal basis for the rule, and an approximate schedule for completing action on any rule for which an agency has issued a notice of proposed rulemaking (NPRM); and
- the name and telephone number of an agency official knowledgeable about the rule.

(Agencies generally join these agendas with those required by Executive. Order 12,866.)

Analyses of Proposed and Final Rules: Initial Regulatory Flexibility Analyses

If an agency determines that there will be a significant economic impact on a substantial number of small entities (including small businesses, small organizations and, small government jurisdictions as defined in section 601(3)–(5)), the agency must prepare an initial regulatory flexibility analysis (IRFA).[4]

Office of Advocacy Comment: In order to make a determination as to whether there is likely to be a significant economic impact on a substantial number of small entities, it is necessary — as a practical reality — to first perform a preliminary informal analysis to determine whether there is any impact.

The IRFA must: (1) describe the impact of the proposed rule on small

[3] The rationale behind this requirement is that small businesses typically do not have access to the *Federal Register*.

[4] 5 U.S.C. §§ 603 and 605.

entities, and (2) describe any alternatives to the proposed rule that would minimize the impact while accomplishing the stated objectives of the applicable statutes.

Small Business Definitions

In developing a rule affecting "small businesses," agencies must: use the definition of small business that is contained in the Small Business Administration's small business size standard regulations,[5] promulgated by the SBA under the Small Business Act; consult with the SBA's Office of Advocacy on an alternate size standard; and publish the standard for public comment. If, however, the statute on which a rule is based provides a different definition of small business, then an agency may use that definition without consultation with the Office of Advocacy.

For further guidance and possible additional requirements, agencies should refer to the SBA's size regulations, 13 CFR § 121.902(b)(4), promulgated under the Small Business Act. The regulation reads:

"Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, the department or agency may, *after consultation with the SBA Office of Advocacy,* establish a size standard different from SBA's which is more appropriate for such analysis." [Emphasis added.]

Publication of IRFA for Public Comment

Section 603(a) states that either the full text or a summary of the IRFA must be placed in the *Federal Register* for public comment when the rule is proposed.[6] In addition, when there will be a significant economic impact on a substantial

[5] 13 C.F.R. § 121.201 (1996).

[6] This requirement also applies to interpretive rules from the Internal Revenue Service (IRS) when the interpretive rule contains a collection of information requirement. See 5 U.S.C. § 603(a).

number of small entities (hence, when an IRFA is required), section 609(a)–(b) requires the head of the agency to ensure that proactive steps are taken to engage participation by small entities in the review of the rule during the early stages of the rulemaking.

Final Regulatory Flexibility Analyses

Under section 604, a final regulatory flexibility analysis (FRFA) must be completed for all final rules with a significant impact on a substantial number of small entities. The purpose of the FRFA is to address the concerns raised in the public comments in response to the IRFA, describe the impact of the rule on small entities, and explain the steps the agency has taken to minimize the impact of the rule on small entities, including reasons for adopting or rejecting each of the regulatory alternatives discussed in the IRFA.

Certification Option: "No Significant Impact"

However, if, after an analysis for a proposed or final rule, an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) provides that the head of the agency may so certify. The certification must include a statement providing the *factual* basis for this determination, and the certification may be published in the *Federal Register* at the time of the proposed rule or the final rule for public comment.[7]

Office of Advocacy Comment: The reasoning for the certification should be clear. Agencies should avoid mere boilerplate assertions in their certifications and provide justification with sufficient clarity to ensure that the public is effectively informed as to the agency's rationale for the certification.

[7] There are circumstances where it may be appropriate to publish an IRFA for the proposed rule, and based on the comments received, publish a certification for the first time in the final rule.

Agency attention to every aspect of the RFA is important because agency compliance with provisions addressing periodic review of regulations, outreach to small entities, small entity definitions, "no impact" certifications, and final regulatory flexibility analyses are subject to judicial review under the SBREFA amendments to the RFA.[8]

The following sections of this guide explain more fully the analytical requirements of the RFA and provide step-by-step guidance on complying with the law. Throughout the guide, the Office of Advocacy has attempted to provide suggestions to address ambiguities in the law as well as discuss the practical implications of the law. The charts in Appendix E, "Overview of the RFA Analysis Development Process," may be particularly helpful in visualizing the entire process.

The RFA establishes an analytical process, not merely procedural steps, for analyzing the impact of regulations on small entities. Boilerplate analyses or certifications will not satisfy the law. The law anticipates that something substantive will emerge from the process to ensure that public policy is enhanced.

[8] Pub. L. No. 104-121, 110 Stat. 864 (codified at 5 U.S.C. § 601 et seq. (1996)).

THE ROLE OF THE SBA'S OFFICE OF ADVOCACY IN THE REGULATORY PROCESS

The Office of Advocacy in the U.S. Small Business Administration was established by Congress in 1976 to be an independent voice for small business in matters of government policy and regulation. The Office is headed by a chief counsel who is appointed from the private sector by the President and confirmed by the Senate. (The Office of Advocacy's mission, structure, and activities are described in greater detail in Appendix B.)

One of the more significant mandates of the Office of Advocacy is to monitor the contribution of small business to competition and the economy. In this connection, the Office publishes significant economic reports on trends and characteristics of small business.

The Office of Advocacy is also charged with measuring the cost of regulations on small business. The Office has published several major reports on this issue and its staff uses economic data to evaluate and develop comments for the public record on the impact of proposed regulations on small business and other small entities.

When Congress enacted the Regulatory Flexibility Act in 1980, it mandated that the Office of Advocacy monitor agency compliance with the law and report annually to the President and to Congress. From a historical perspective, the reports published under that directive show different levels of compliance, as well as patterns of non-compliance, with the law.[9] This has occurred despite the fact that the Office of Advocacy has submitted numerous formal comments over the years on a wide range of regulatory proposals, highlighting deficiencies in agency compliance with the RFA. This non-compliance resulted in large part

[9] See U.S. Small Business Administration, Office of Advocacy, *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act* (Washington, D.C.: U.S. Small Business Administration, 1983–1997).

from the fact that the RFA provided no enforcement mechanism to force agency compliance.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 amended the RFA significantly, the major change being a provision that allows small entities appealing final regulations to seek judicial review of agency compliance with certain provisions of the RFA. SBREFA also strengthened the *amicus curiae* (friend of the court) authority of the SBA's chief counsel for advocacy by allowing him to address (1) agency compliance with the RFA; (2) the adequacy of an agency's rulemaking record with respect to small entities; and (3) the effect of the rule on small entities.[10] The chief counsel's *amicus curiae* authority, therefore, extends beyond RFA issues.

[10] Pub. L. No. 104-121, § 243(b)(2), 110 Stat. 866 (codified as amended at 5 U.S.C. § 612(b)).

ANALYZING PROPOSED RULES I: FIRST STEPS

The Regulatory Flexibility Act requires agencies to consider the impact of their rules on small entities and to evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities when the rules impose a significant economic impact on a substantial number of small entities. Although the RFA does not specifically require agencies to preserve competition in the marketplace, inherent in the RFA is a desire to remove barriers to competition and encourage agencies to consider ways of tailoring regulations to the size of the regulated entities.[11]

The RFA does not require that agencies necessarily minimize a rule's impact on small entities if there are significant legal, policy, factual, or other reasons for the rule's having such an impact. The RFA requires only that agencies determine, to the extent feasible, the rule's economic impact on small entities, explore regulatory alternatives for reducing any significant economic impact on a substantial number of such entities, and explain the reasons for their ultimate regulatory choices.

Office of Advocacy Comment: The RFA should promote creative thinking about regulatory alternatives that achieve statutory purposes, while still minimizing the impacts on small entities. Regulatory flexibility analyses built into the regulatory development process at the earliest stages will help agency decision-makers achieve regulatory goals with realistic, cost-effective, and less burdensome regulations.

Some of the relevant questions to consider in the first steps of an RFA analysis are:

- Does the RFA apply?
- What is the definition of a small entity?
- What is the preliminary economic impact assessment based on the size and type of entities affected and the likely overall cost?

[11] See, generally, FINDINGS AND PURPOSES, SEC. 2(a)–(b).

• What attempts outreach to small entities have been made to assess or verify potential impacts?
• Whether or not to certify — Does the rule have a significant economic impact on a substantial number of small entities?
• If there is a certification, have the justifications for the certification been explained sufficiently?

The following sections will attempt to define these terms as well as provide guidance on answers to these questions.

Office of Advocacy Comment: By far, the Office of Advocacy receives the most inquiries concerning the provisions of the RFA that deal with the terms "small entity"; "significant economic impact"; and "substantial number."

Does the RFA Apply?

Relevance of the Administrative Procedure Act. The RFA applies to any rule subject to notice and comment rulemaking under section 553(b) of the Administrative Procedure Act (APA), or any other law, including any rule of general applicability governing federal grants to state and local governments, for which agency procedures provide opportunity for notice and comment. For instance, some agencies, such as the Rural Utilities Service, have their own administrative rules that require notice and comment even though the agency's rules may be exempt from the APA.

The APA and RFA Exemptions. Rules are exempt from APA requirements, and therefore from the RFA requirements, when any of the following is involved: (1) a military or foreign affairs function of the United States or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.[12] In addition, the RFA does not apply to rules of particular applicability relating to rates, wages, corporate or financial structures

[12] 5 U.S.C. § 553(a).

or reorganizations thereof, prices, facilities, appliances, services or allowances.[13]

RFA Now Applies to Certain IRS Rules. The SBREFA amended the RFA to bring certain interpretative rulemakings of the Internal Revenue Service within coverage of the RFA. The law now applies to those IRS rules published in the *Federal Register* that impose a "collection of information" (paperwork) requirement on small entities.[14]

What Is the Definition of a "Small Entity"?

Defining Small Entities. The definition of "small entity" is important because it is the starting point for determining the degree of impact a regulation will have. The size of the business, government unit, or not-for-profit organization being regulated has a bearing on the ability of that entity to comply with federal regulations. For example, the costs of complying with a particular regulation — measured in staff time, recordkeeping, outside expertise, and other direct compliance costs — might be roughly the same for a company with sales of $10 million as for a company with sales of $1 million. In a larger business, however, the costs of compliance can be spread over a larger volume of production. For small entities, a burdensome regulation could affect the ability to set competitive prices, to devise innovations, or even to make a profit.[15] In some cases, a small business may be unable to stay in business due to the cost of a regulation. Simply stated, fixed costs have a greater impact on small entities because small entities have fewer options for recovering those costs. Thus, if an agency does not have access to a good profile of the industry or industries to be regulated or does not know the number and type of entities that would be affected by a rule, any determination regarding impact will not be credible. (Appendix C contains

[13] 5 U.S.C. § 601(2).

[14] 5 U.S.C. §§ 601(b)(1)(a), 603.

[15] See Todd A. Morrison, *Economies of Scale in Regulatory Compliance: Evidence of the Differential Impacts of Regulation by Firm Size*, report no. PB85-178861, prepared by Jack Faucett Associates, Inc., for the U.S. Small Business Administration, Office of Advocacy (Springfield, Va.: National Technical Information Service, 1985).

data sources that may be helpful in drawing distinctions between large and small entities.)

Three types of small entities are defined in the RFA:

"Small Business." Section 601(3) of the RFA defines a "small business" as having the same meaning as "small business concern" under section 3 of the Small Business Act. This includes any firm that is "independently owned and operated" and is "not dominant in its field of operation."[16] As previously discussed, the SBA has developed specific regulations concerning size standards and related issues.[17] To the extent that an agency believes that SBA's definition of "small business" is not appropriate for purposes of this chapter, there are provisions that allow agencies to develop their own definition or definitions of "small business" appropriate to the activities of the agency. To establish a different definition of "small business" for a rule, agencies must (1) consult with the Office of Advocacy; (2) provide an opportunity for public comment on the definition in the proposed rule; and (3) publish the final definition(s) in the *Federal Register* with the final rule.

"Small Organization." Section 601(4) defines a small organization as any not-for-profit enterprise that is independently owned and operated and not dominant in its field (for example, private hospitals and educational institutions). Agencies may develop one or more alternative definitions of "small organization" for purposes of this chapter provided that they: (1) give an opportunity for public comment and (2) publish the final definition in the *Federal Register*.

"Small Governmental Jurisdiction." Section 601(5) defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000. Agencies may develop one or more alternative definitions for this term provided that they: (1) give opportunity for public comment, (2) base defini-

[16] 15 U.S.C. § 632.

[17] 13 C.F.R. § 121.201 (1996).

tions on factors such as low population density and limited revenues, and (3) publish final definitions in the *Federal Register*.

Agency decisions under section 601 of the Act are subject to judicial review. Thus, any agency size standard determination that differs from the SBA's size standard is subject to review.[18]

Office of Advocacy Comment: As noted on page 7 of this guide, there may be additional requirements for selecting an alternate definition of size for small businesses (but not small organizations or small governmental jurisdictions) under the Small Business Act, 15 U.S.C. § 632(a)(2)(C) and SBA regulations, 13 C.F.R. § 121.902 (1997)).

What Is the Preliminary Assessment as to the Economic Impact on Small Entities?

Determining a rule's impact on small entities is an important part of the rulemaking process. The RFA requires agencies to conduct sufficient analyses to measure and consider the regulatory impacts of the rule and whether there will be a significant economic impact on a substantial number of small entities. Unlike Executive Order 12,866, which defines a "significant rule" as one with an impact on the economy of $100 million or more, there is no such threshold in the RFA for defining "significant economic impact on a substantial number of small entities." No definition could, or arguably should, be devised to apply to all rules given the dynamics of the economy and changes that are constantly occurring in the structure of small-entity sectors.

Every rule is different. The level, scope, and complexity of analysis may vary significantly depending on the characteristics and composition of the industry or small-entity sectors to be regulated. This is why it is important that agencies make every effort to conduct a sufficient and meaningful analysis when promulgating rules.

Office of Advocacy Comment: The preparation of the required analysis calls for due diligence,

[18] 5 U.S.C. § 611(a).

knowledge of the regulated small entity community, sound economic and technical analysis, and good professional judgment. It seems reasonable to conclude from the overall objectives of the RFA that the first steps in the analytical process might include understanding the nature and economics of the industry/entities being regulated, and identifying how much each sector is contributing to the problem the agency is trying to address and mitigate.

Definition of "Significant" and "Substantial"

Congress provided no specific definitions for the terms "significant" and "substantial." In the absence of statutory specificity, the process of defining these terms should trigger critical thinking among agency regulatory personnel. Thus, what is "significant" or "substantial" will vary depending on the underlying enabling legislation, the problem being addressed, the rule being promulgated, and the preliminary assessment of the rule's impact.

Some agencies have begun to develop criteria for determining whether a particular economic impact is significant and whether the proposed action will affect a substantial number of small entities.[19] For example, the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce considers a substantial number of small entities to be more than 20 percent of the industry. NOAA defines a significant effect as a regulation that is likely to (1) reduce gross revenues by more than 5 percent; (2) increase total costs of production by more than 5 percent; (3) cause small entities to incur compliance costs 10 percent greater than compliance costs of large entities; or (4) cause 2 percent of small entities to cease business operations.

In another example, the Department of Health and Human Services has determined that a rule is not significant if it would not reduce revenues or raise costs of any class of affected entities by more than 3 to 5 percent within five years.

Office of Advocacy Comment: As discussed in the second example, some agencies like to use a

[19] These criteria are for illustrative purposes only and are not endorsed by the Office of Advocacy.

simple economic rule and apply a percentage-of-revenues criterion; however, general application of such a rule may be problematic. A 2-percent reduction in revenues in one small commercial or industrial category would be significant if their profits are only 3 percent of revenues. Moreover, over 60 percent of small businesses do not claim a profit and do not pay taxes; therefore, an agency would not be able to apply a profit-based criterion to these firms.

The Office of Advocacy welcomes agency initiatives to provide a framework for their analytical processes. However, it takes no position on the validity of the criteria except in the context of how the criteria are used to measure impact and to develop a particular rule.

The absence of a particularized definition of either "significant" or "substantial" does not mean that Congress left the terms completely ambiguous or open to unreasonable interpretations. Courts have reviewed statutes that are analogous to the RFA in purpose and ruled on certain definitions. Thus, the Office of Advocacy relies on two sources for general guidance on defining these terms: (1) legislative history and (2) court decisions under analogous laws.

Office of Advocacy Comment: The Office of Advocacy also relies on these sources for discussion later in this guide to conclude that "impact" under the RFA means both adverse and beneficial impacts. Admittedly, throughout this guide, references are made to "adverse" impacts and efforts to "mitigate" impacts. This, after all, is the primary concern of the law. Legislative history, however, makes it clear that Congress intended that regulatory flexibility analyses also address "beneficial" impacts.

Legislative History: "Substantial Number"

To affect a substantial number, a proposed regulation must certainly impact at least one small entity. At the other end of the range, legislative history would not require agencies "to find that an overwhelming percentage [(more than half)] of small [entities] would be affected" before requiring an IRFA.[20] Legislative history also says that the term "substantial" is intended to mean a substantial number of entities within a particular economic or other activity.[21] The

[20] 126 CONG. REC. S10941 and 10942 (1980)(SECTION-BY-SECTION ANALYSIS OF THE REGULATORY FLEXIBILITY ACT).

[21] 126 CONG. REC. at S10938.

intent of the RFA, therefore, was not to require that agencies find that a large number of the entire universe of small entities would be affected by a rule.

Office of Advocacy Comment: The Office of Advocacy recognizes that the quantification of "substantial" may be industry- or rule-specific. Nevertheless, it is the opinion of the Office of Advocacy that any rule that impacts "more than just a few" small businesses within an industry warrants the application of the RFA's analytical processes, at least initially. In other words, to make an initial threshold determination of impact, an agency should utilize the "more than just a few" criteria before making a final determination regarding the need for an initial regulatory flexibility analysis.

Legislative History: "Significant Economic Impact"

With regard to the term "significant economic impact," Congress said:

"the term 'significant economic impact' is, of necessity, not an exact standard. Because of the diversity of both the community of small entities and of rules themselves, any more precise definition is virtually impossible and may be counterproductive. Any more specific definition would require preliminary work to determine whether the regulatory analysis must be prepared."[22]

Congress also stated that,

"Agencies should not give a narrow reading to what constitutes a "significant economic impact," and that "a determination of significant economic effect is not limited to easily quantifiable costs." [23]

Congress has identified several examples of "significant impact": a rule that provides a strong disincentive to seek capital[24]; 175 staff hours per year for recordkeeping[25]; impacts greater than the $500 fine imposed for non-compliance[26]; new capital requirements beyond the reach of the entity[27]; any

[22] 126 CONG. REC. at S10942 (1980).

[23] 126 CONG. REC. at S10940 (1980).

[24] 126 CONG. REC. at S10938 (1980).

[25] *Idem*.

[26] 126 CONG. REC. at H24578 (1980).

impact less cost-efficient than another reasonable regulatory alternative[28]; any impact where the adverse cost impact is greater than the value of the regulatory good. None of these standards establish a ceiling below which impacts are not significant. Other, more specific examples are contained in the House of Representatives report on the RFA.[29]

Legislative History and Case Law: Adverse and Beneficial Impacts

Congress apparently considered the term "significant" neutral with respect to whether the impact benefits or harms small business, therefore suggesting the need to consider both in an analysis. The legislative history on the RFA provides explicit insights into congressional intent with respect to the issue of beneficial impacts:

"Agencies may undertake initiatives which would directly benefit such small entities. Thus, the term 'significant economic impact' is neutral with respect to whether such impact is beneficial or adverse. The statute is designed not only to avoid harm to small entities but also to promote the growth and well-being of such entities."[30]

Moreover, early drafts of the RFA used the term "substantial adverse" impact, but the final bill used only the term "substantial impact."[31]

[27] 126 CONG. REC. at H24593 (1980).

[28] 126 CONG. REC. at H24595.

[29] "A gas station owner spent 600 hours last year filling out just his federal reporting forms. An Idaho businessman paid a $500 fine rather than fill out a federal form which was 63 feet long. A New Hampshire radio station paid $26.23 in postage to mail its license renewal back to Washington. A dairy plant licensed by 250 local governments, 3 states, and 20 agencies had 47 inspections in 1 month. A butcher had one federal agency tell him to put a grated floor in his shop one month and then the next month was told by another federal agency he could not have a grated floor. A company was forced out of the toy business because one of its main products was inadvertently placed on a federal ban list. An Oregon company with three small shops received federal forms weighing 45 pounds." 126 CONG. REC. H8467 (1980).

[30] 126 CONG. REC. H8468 (September 8, 1980) (discussion of issues from House consideration of the RFA).

[31] See S.2147, 96th Congress, 1st Sess. (1979).

Research thus far by the Office of Advocacy has not produced any RFA case law that provides guidance on the "adverse vs. beneficial" question. However, courts have recently applied definitions for "significant impact" to other statutes. For example, in a case involving the National Environmental Policy Act (NEPA), *Friends of Fiery Gizzard v. Farmers Home Administration,*[32] the court held that a full environmental impact statement (EIS) does not need to be prepared if the only impact of the project will be beneficial. However, the court acknowledged that when both negative and beneficial effects are present an EIS must be prepared even if the agency feels that the beneficial effects outweigh the negative ones.[33] (This case does not say that beneficial impacts should not be considered for the preliminary assessment, nor does it say that beneficial impacts are never a factor.) Earlier cases interpreting NEPA held that beneficial impacts should be a consideration in the rulemaking process.[34]

Office of Advocacy Comment: Several agencies have taken issue with the Office of Advocacy's interpretation of significant economic impact. However, the Office believes that its interpretation is consistent with the legislative history and overall purposes of the RFA. The Office of Advocacy does not dispute that the RFA requires agencies to "minimize the significant economic impact" (5 U.S.C. § 601, note). However, the Office of Advocacy's interpretation does not necessarily mean that agencies should minimize beneficial impacts — that certainly would be contrary to the purposes of the RFA. Instead, the Office believes that agencies can minimize the adverse impact by including beneficial impacts in the analysis. It is possible to do this with minimal effort and without necessarily triggering the procedural requirements of the RFA, namely, the requirements for an IRFA. Moreover, analyzing beneficial impacts lends credibility to the alternatives selected by the agency.

[32] 61 F.3d 501 (6th Cir. 1995).

[33] Ibid., at 505.

[34] See *Hiram Clarke Civic Club v. Lynn*, 476 F.2d 421, 426-27 (5th Cir. 1973) (considering only negative impacts "raises serious questions about the adequacy of the investigatory basis underlying the HUD decision not to file an EIS."); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981) ("[A] beneficial impact must nevertheless be discussed in an EIS, so long as it's significant. NEPA is concerned with all significant environmental effects, not merely adverse ones.")

Certification of "No Significant Impact"

The RFA permits the head of a federal agency head to forego the preparation of an initial regulatory flexibility analysis (IRFA) upon a written certification that a rule will not have a "significant economic impact on a substantial number of small entities."[35] If an agency opts for this determination, the certification must include a factual basis for the decision.[36] Congress intended that the "factual basis" should provide a sufficient record upon which a court may review an agency's actions.[37]

Finally, if an agency can certify that a rule will not have a significant impact on a substantial number of small entities, no further analysis is needed under the RFA, other than the "factual basis" for the certification.

Office of Advocacy Comment: The Office of Advocacy interprets the "factual basis" requirement to mean that, at a minimum, a certification should contain a description of the affected entities and the impacts that clearly justify the "no impact" certification. The agency's reasoning and assumptions underlying its certification should be explicit in order to elicit public comment and thus assure that the rule was not certified in error.

Agency certifications are subject to judicial review. Thus, certifications of "no significant economic impact on a substantial number of small entities" have major legal implications for agencies. Consequently, boilerplate certifications need to be avoided. The "more than just a few" standard for determining if a rule will impact a "substantial number of small entities" is a rigorous test for agencies to follow, but when the minimum or maximum cut-offs are unknown, the Office of Advocacy urges the safest course. In other words, if an agency has miscalculated the impacts of a regulation because its standard for determining "substantial number" was set too high, the certification may give rise to avoidable court challenges.

Also, if an agency is uncertain of the impact, it is recommended that the agency err on the side of caution and perform an IRFA with the available data and information, and solicit

[35] 5 U.S.C. § 605(b).

[36] Prior to the SBREFA amendments in 1996, the RFA only used to require that certifications be supported by a "succinct statement explaining the reasons for the certification." The amended version of the RFA now requires that certifications be supported by a "statement of factual basis." It is fairly clear that in amending the RFA, Congress intended that agencies should do more that provide boilerplate or unsubstantiated statement(s) to support their RFA certifications.

[37] See 142 CONG. REC. E574, April 19, 1996.

comments from small entities regarding impact. Then, if appropriate, the agency can certify the final rule.

An agency should consider establishing support for any certification with written documentation from small entities affected by the rulemaking. Although such written documentation from small entities is not required, efforts to obtain such documentation will help ensure that agencies are reaching the proper conclusion and conducting appropriate outreach to small entities. (See discussion of outreach to small entities on pages 24 to 25.)

Certification Using Other Definitions of "Small Business"

Certification of a rule that regulates business (as opposed to small organizations or small governmental jurisdictions) necessarily implies that the agency is using the SBA's definition of a small business, unless the rulemaking agency states otherwise.

If an agency intends to rely on a small business definition for its certification that differs from the definition detailed in section 601(3) of the RFA as amended, it must first consult with the Office of Advocacy on an appropriate definition/size standard. In addition, the preamble to the rule must notify the public that it is using a different standard in order to provide an opportunity for comment, and the agency must publish its proposed definition(s) in the *Federal Register*.

Office of Advocacy Comment: If an agency certifies a rule, the Office of Advocacy suggests that the agency insert the following language into the preamble to the rule:

"Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b), the head of [*name of agency or department*] certifies that this rule will not have a significant economic impact on a substantial number of small entities. [*Explain the factual basis for the certification.*]

"In making this determination, the agency [used/did not use] the SBA definition of small business, found at 13 C.F.R. § 121.201: [*Quote the SBA standard.*]"

"Instead, after consultation with the Office of Advocacy and after receiving the prior approval of the SBA Administrator, the small business definition used by the [*name of agency*] for this certification is: [*Insert definition used and explain rationale for the alternative.*]"

"Comments are solicited on the appropriateness of this size standard in certifying that this rule will not have a significant impact on a substantial number of small entities."

What Attempts at Outreach Have Been Made?

Section 609 of the Act requires agencies to ensure that small entities have an opportunity to participate in any rulemaking that will have a significant economic impact on a substantial number of small entities. Agency compliance with section 609(a) of the Act, as it relates to the preparation of the final regulatory flexibility analysis, is subject to judicial review. Section 609(a)(1)–(5) requires the reasonable use of specific techniques for gathering the comments of small entities. Among the techniques listed in the RFA are:

• "The inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic impact on a substantial number of small entities." (5 U.S.C. § 609(a)(1)).

Office of Advocacy Comment: This explicit statement will alert small entities to the rule's potential impacts on them, increasing their ability to participate in an informed way in the critically important early stages of regulatory development. It also may help agencies identify sources of specialized expertise that may make it easier to identify a rule's impact on small entities and develop alternatives to reduce or eliminate the impacts before a rule is fully developed and proposed.

• "The publication of general notice of proposed rulemaking in publications likely to be obtained by small entities." (5 U.S.C. § 609(a)(2)).

Office of Advocacy Comment: Most small entities do not have ready access to, or cannot effectively monitor, the *Federal Register*. They may, however, be associated with national and state organizations and trade associations that notify their members of pending regulatory actions through newsletters, newspapers, magazines, and trade publications. Agencies should maintain current lists of organizations. The Office of Advocacy maintains a list of some small business representatives and can provide this information to the agencies upon request.

• "The direct notification of interested small entities." (5 U.S.C. § 609(a)(3)).

Office of Advocacy Comment: Associations that represent small businesses and other small entities are frequently the best resources for notifying the affected small business community. However, many small entities, especially small businesses, are not members of

associations. Therefore, it may be helpful to use other communications options, such as public service announcements, to reach as many underrepresented small entities as possible. Agencies should consider using official announcements in newspapers or magazines of general circulation to reach small entities not otherwise readily accessible for important rules.

• "The conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks." (5 U.S.C. § 609(4)).

Office of Advocacy Comment: Creating an environment for open dialog by speaking, for example, to groups of interested business persons or creating electronic communication vehicles to reach small businesses and other small entities can be very effective. Agencies are encouraged to work with regional and state agencies to have representatives listed in speakers' bureaus and to use standard texts and electronic formats to disseminate information to the small business community and other small entities on pending actions that may affect them. Agencies should explore new ways, such as electronic communication and the use of the Internet, to help small entities play a meaningful role in the rulemaking process.

• "The adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities." (5 U.S.C. § 609(a)(5)).

Office of Advocacy Comment: Agencies should consider options such as holding hearings at their regional or district offices to facilitate grass-roots participation by small entities, as well as local trade association representatives, in the rulemaking process. Hearings could also be held in the evenings or on Saturdays to give more small entities an opportunity to participate in the process without taking time from their normal work schedule.

If agencies formalize intragency staff guidance, incorporating some or all of the suggestions outlined under each of the preceding quotes from section 609 of the RFA, participation in the rulemaking process by small entities should increase and improve information available to regulators.

ANALYZING PROPOSED RULES II: PREPARING AN INITIAL REGULATORY FLEXIBILITY ANALYSIS

Once an agency concludes that the RFA applies and that its proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) must be prepared. According to section 605(c), to avoid duplicative action agencies may consider a series of closely related rules as one rule for the purposes of complying with the IRFA requirement.

Section 603 of the RFA sets forth the criteria for what an IRFA must include and specifies that the IRFA be made available for public comment. The IRFA, or a summary thereof, must appear in the *Federal Register* at the time of publication of the proposed rule. The agency must also send a copy of the IRFA to the SBA's chief counsel for advocacy.

Office of Advocacy Comment:

IRFAs in a Nutshell. As a preliminary step, an agency should develop a profile of different-sized entities likely to be affected by the rule. In addition, an agency needs to assess how each of these different-sized entities will be affected. This means that the agency needs to specify the number and type of entities affected, compliance costs, objectives to be achieved, and comparisons of regulatory alternatives to the regulation — alternatives that would minimize economic impacts without sacrificing stated objectives. Data, models, and assumptions should be identified and evaluated explicitly, together with adequate justifications for the alternatives selected.

Section 603 requires agencies to examine the objectives, costs, and other economic implications on the industry sectors targeted by the rule. Impacts examined may include economic viability (including closure), competitiveness, productivity, and employment impacts. To be most useful, such an analysis would also present information on the uncertainty surrounding the analysis and would capture uncertainty within the analysis itself. The analysis should identify cost burdens for the industry sector and/or for the individual small entities affected. Costs might include engineering and hardware acquisition, maintenance and operation, employee skill and training, administrative practices (including recordkeeping and reporting), productivity, and promotion.

The results of the analysis should allow commentors to compare the impacts of regulatory

alternatives on the differing sizes and types of entities targeted and/or affected by the rule, allowing direct comparison of small and large entities to determine the degree to which the alternatives chosen disproportionately affect small entities or a targeted sub-sector.

What the RFA anticipates is that the public be given a road map to an agency's thinking as to the nature of the problem it is trying to address, factors contributing to the problem, what is the most effective way to address the problem, and how much of the issue will be addressed by different regulatory alternatives.

Clearly, there needs to be a balance between thoroughness of an analysis and practical limits of an agency's capacity to carry out the analysis. If economic data are available, then an agency should utilize these data in preparing an RFA analysis. Information on how to conduct an economic analysis, such as the guidelines in OMB's "Economic Analysis of Federal Regulations Under Executive Order 12866" should be consulted.[38] In addition, small business data, including data referenced in Appendix C, "Small Business Statistics for Regulatory Analysis," should be reviewed.

When data are not readily available, industry outreach can be used to collect data. If none of the foregoing is productive, then agencies should use the Notice of Proposed Rulemaking to solicit data.

Questions to Be Addressed in an IRFA

Some of the important questions to be addressed in preparing an IRFA are:

1. Which small entities will be impacted most? Should the definition of "small entity" be redefined for purposes of the RFA?
2. Are all the required elements of an IRFA present, particularly a description of all compliance requirements, and a clear explanation of the need for and objectives of the rule?
3. Have all major cost factors been developed and analyzed?
4. What alternatives will allow the agency to accomplish its regulatory objectives while minimizing the impact on small entities?
5. When can other statutorily required analyses be used to sup-

[38] Executive Office of the President, Office of Management and Budget, "Economic Analysis of Federal Regulations under Executive Order 12866" (January 1996); reprinted in *Daily Report for Executives* (January 22, 1996), pp. M2–16.

plement and/or satisfy the IRFA requirements of the RFA?
6. Are there circumstances under which preparation of an IRFA may be waived or delayed?

Which small entities will be impacted most? Should the definition of "small entity" be redefined for purposes of the RFA?

After an agency determines that it will prepare an IRFA, it should consider whether the RFA definitions (hence, the SBA size standards[39]) of small entities are suitable for the rule.[40] Although the RFA definitions may be adequate to make an initial determination that a rule will affect small entities, they may not be adequate for purposes of analyzing discrete impacts of the rule or of regulatory alternatives.

The SBA's size standards for small business are generally based on the total number of employees in an enterprise or on gross annual revenues. If the agency determines that the existing SBA size standards for small businesses are not appropriate, section 601 of the RFA permits the agency, after notice and comment, to establish one or more alternative definitions of a small entity that are appropriate for the given rule. Also, in any instance involving a rule's definition of "small business" different from the SBA's size standards, the agency must first consult with the Office of Advocacy.

Are all the required elements of an IRFA present, particularly a description of all compliance requirements, and a clear explanation of the need for and objectives of the rule?

The principal issues to be addressed in an IRFA are the impact of a proposed rule on small entities, and the comparative effectiveness and costs of alternative regulatory options. Under the Act, an IRFA must describe the impact of the

[39] Small business size standards are published at 13 C.F.R. § 121.201 (1996).

[40] 5 U.S.C. § 601.

proposed rule on small entities and, under section 603(b), must contain the following information:

> 1. a description of the reasons why action by the agency is being considered;
> 2. a succinct statement of the objectives of, and legal basis for, the proposed rule;
> 3. a description — and, where feasible, an estimate of the number — of small entities to which the proposed rule will apply;
> 4. a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
> 5. an identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap, or conflict with the proposed rule.

Section 607 of the RFA provides that, in complying with section 603 of the Act, agencies are required to develop a quantitative analysis of the effects of a rule and its alternatives with available data. If, however, quantification is not practicable or reliable, agencies may provide general descriptive statements regarding the rule's effects.[41] This second option appears only to be a last resort, when quantification cannot be achieved.

The approach an agency takes will depend on such factors as the quality and quantity of available information and the anticipated severity of a rule's impacts on small entities subject to the rule.

Office of Advocacy Comment: A thorough description of impact should, to the extent practicable:

• provide a profile of the regulated industry and the number of small entities affected, and divide the industry into sectors and different size categories in order to determine if the impacts are different;

[41] Where a lack of data prohibits quantification, the Office of Advocacy believes that the analysis should identify missing data elements and the aspects of the quantitative analysis that could not be completed. Similarly, reliance on analogous data and assumptions should be identified and fully explained. Explicit explanations of assumptions relied on help the public determine whether the analysis is adequate.

• identify the steps taken to develop a definition of a small entity, if different from the SBA's size standards; and
• identify the small entities expected to face more significant impacts than other industry sectors as a result of the rule.

An IRFA would be most informative if it segmented an industry to determine if regulatory impacts differed, and if it also examined regulatory options that would accommodate the different impacts without sacrificing the objectives of the rule. The rule could then be tailored to address industry segments differently in ways that achieved the same overall regulatory objective. (To obtain industry data refer to Appendix C, "Small Business Statistics for Regulatory Analysis.")

Have all major cost factors been developed and analyzed?

Some of the costs which must be described in an IRFA include any record-keeping, reporting, and professional expertise needed to complete the mandated reports or records.[42]

Office of Advocacy Comment: Many other significant cost factors may exist in a particular rule, and agencies should endeavor to describe and analyze all such cost factors. The fact that the RFA does not specifically outline all potential cost factors is not a license for agencies to avoid performing full and complete analyses. Since all rules are different and impose different compliance requirements, the RFA contemplates that agencies will prepare analyses to determine all significant long- and short-term compliance costs.

Some other costs associated with a rule may include engineering controls, loss or reduction of markets, hiring professional expertise (for example, legal, consulting, or accounting expertise), hiring additional staff, etc.

The IRFA should also, to the extent practicable, compare the costs of compliance for small and large entities to determine if small entities are affected disproportionately. Also, to the extent practicable, the IRFA should analyze the ability of small entities to pass on these costs in the form of price increases or user fees and the effects on profitability or the ability to provide services. The IRFA also might include the resulting effects (if any) on economic viability, production, operating costs, employment, and other economic factors. Ideally, this should be done for each regulatory alternative.

[42] 5 U.S.C. § 603(b)(4).

What alternatives will allow the agency to accomplish its regulatory objective while minimizing the impact on small entities?

The RFA requires agencies to provide a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize the rule's economic impact on small entities.[43] The development and analysis of realistic alternatives, including no regulation, are major components of the regulatory flexibility analysis. The kinds of alternatives that are possible will vary based on the particular regulatory objective.[44]

Office of Advocacy Comment: The value of the analysis to decision makers (as well as the public) is that it establishes a process for evaluating how to solve problems efficiently and effectively through regulation, without unduly burdening small entities, erecting barriers to competition, or stifling innovation. It helps determine what percentage of a problem can be solved at different cost levels.

The analysis also provides important information to small entities and the general public that helps facilitate informed public commentaries.

The Office of Advocacy offers the following suggestions for developing and evaluating regulatory alternatives:
• Identify regulatory alternatives at the earliest stage of rulemaking.
• Consult representatives of small entities on how best to address the problem the agency is trying to solve, and on which portions of a regulation generate the greatest burdens and/or benefits. Solicit recommendations on workable alternatives. Such consultation will help agencies understand the nature and characteristics of the small entities and the industry being regulated. Agencies should also use the notice and comment process to solicit information on the economic and structural characteristics of the industry and the comparative impacts of different provisions of the rule on small entities.
• Consider and assess the comparative benefits of the rule to large and small entities. A cost-effective alternative that reduces burdens for both large and small entities should also be an option that is evaluated in a regulatory flexibility analysis.

Consistent with the stated objectives of applicable statutes, section

[43] 5 U.S.C. § 603(c).

[44] Giving small entities a longer time to comply with the proposed regulation, for instance, will generally reduce the burden on small entities. If the proposed regulation involved new labeling requirements, extending the implementation date would allow the regulated community to deplete the existing inventory of labels, design new ones and implement any new marketing strategies — while accomplishing the regulatory objectives of the agency.

603(c)(1)–(4) of the RFA requires agency analyses to discuss regulatory alternatives such as:

- establishment of different compliance or reporting requirements for small entities or timetables that take into account the resources available to small entities;
- clarification, consolidation, or simplification of compliance and reporting requirements for small entities;
- use of performance rather than design standards; and
- exemptions for certain or all small entities from coverage of the rule, in whole or in part.

When can other statutorily required analyses be used to supplement or satisfy the IRFA requirements of the RFA?

Section 605 of the RFA provides that agencies may prepare IRFAs (and FRFAs) in conjunction with, or as a part of, any other analysis required by law as long as the RFA's requirements are satisfied.

For major rules that require the preparation of a regulatory impact analysis (RIA) under Executive Order 12,866,[45] agencies may prepare the RIA and the regulatory flexibility analyses together. Agencies can coordinate their preparation of regulatory flexibility analyses with any other analyses accompanying a rule. In doing so, however, agencies should ensure that such analyses describe explicitly how the requirements of the Regulatory Flexibility Act are satisfied.[46]

Similarly, evaluations of administrative burdens associated with reporting

[45] On September 30, 1993, the President issued Executive Order 12,866, "Regulatory Planning and Review," superseding the earlier Executive Order 12,291. The process created by this new order ensures that the federal government issues regulations that improve the quality of life without imposing unnecessary costs. The specific goals set forth to achieve this objective are "to enhance planning and coordination with respect to both new and existing regulations, to reaffirm the primacy of federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public."

[46] See "Economic Analysis of Federal Regulations under Executive Order 12866."

and recordkeeping requirements can be developed in concert with the paperwork burden analysis prepared under the Paperwork Reduction Act.

Agencies, however, need to exercise caution when trying to rely on other analyses to satisfy the RFA, because another analysis may not necessarily be a complete substitute for a regulatory flexibility analysis.

For example, Executive Order 12,866 imposes analytical requirements that differ from those of the RFA. The RFA requires agencies to identify and consider alternatives that minimize a rule's impacts on small entities subject to the rule, but does not specifically require that an agency select the alternative with the least impact on small entities or which generates the most benefit for small entities.[47] Executive Order 12,866, on the other hand, requires agencies to select the alternative that provides the maximum net benefit to society, to the extent that it is statutorily feasible. By the same token, although the requirements differ, one should not assume that the analysis performed for one will automatically result in conclusions that will differ from those arrived at under the other. One of the primary purposes of the Executive Order is to ensure the promulgation of cost-effective regulations. The alternative that achieves statutory and regulatory objectives while minimizing small entity impacts under the RFA is likely to be identical to the alternative with the largest net benefit to society. In some cases, however, an agency may find that the regulatory impact analysis and the regulatory flexibility analysis point to different options.

Office of Advocacy Comment: Such conflicts should be resolved on a case-by-case basis, in accordance with the RFA and other underlying statutes, and in consultation with the agencies' respective Offices of General Counsel. Although an agency is not required to consult the Office of Advocacy for the resolution of such conflicts, such consultation will help agencies obtain information on small-entity impacts that may help resolve the conflict.

Are there circumstances under which preparation of an IRFA may be waived or delayed?

Section 608 of the RFA provides that an agency may waive or delay the

[47] See 5 U.S.C. § 603(c).

completion of some or all the requirements of section 603 regarding preparation of IRFAs if the rule is being promulgated in response to an emergency that makes compliance with the RFA impracticable.[48] Promulgating agencies must publish the waiver or delay in the *Federal Register* no later than the date of publication of the final rule. If a true emergency exists, the agency must explain clearly why the circumstances are emergent.

Agencies should note that the RFA does not specifically allow certifications of proposed (or final) rules issued pursuant to section 605(b) to be waived or delayed. Certifications must be published at the time of the proposed or final rule.

As discussed on page 16 of this guide, federal agencies must make a preliminary assessment regarding the impact of proposed rules on small entities and this assessment, if it results in a certification, is judicially reviewable.

Special Requirements for Regulatory Analysis by EPA and OSHA

Before publication of an IRFA by the Environmental Protection Agency (EPA) or by the Occupational Safety and Health Administration (OSHA), section 609(b) of the RFA requires these agencies to take the following additional steps:

- the agency must provide information to the SBA's chief counsel for advocacy about the potential impact of a proposed rule on small entities and the type of small entities that might be affected;
- within 15 days after receiving the materials, the chief counsel is required to identify representatives of affected small entities to be consulted on the impacts of a proposed rule;
- the agency is then required to convene a review panel consisting of agency employees responsible for carrying out the proposed rule, the OMB's Office of Information and Regulatory Affairs (OIRA), and the SBA's chief counsel for advocacy.

[48] See section 608(b) for details on delaying, but not waiving, a final regulatory flexibility analysis.

• the panel is charged with reviewing RFA materials prepared by the agency, including any draft proposed rule; collecting advice and recommendations of each small-entity representative identified by the agency after consultation with the chief counsel for advocacy on issues related to the contents of an IRFA (section 603(b)(3)–(5)) and the description of the alternatives (section 603(c));

• within 60 days of convening the panel, the panel is required to prepare a report outlining the comments of the small-entity representatives and the panel's findings as to sections 603(b)(3)–(5) and 603(c) — provided that the panel's report shall be made public as part of the rulemaking record; and

• where appropriate, the agency shall modify the proposed rule, the IRFA, or the decision on the need for an IRFA.

Waiver of the EPA or OSHA Panel Review Process

Under section 609(e) of the RFA, the SBA's chief counsel for advocacy, in consultation with the administrator of OIRA and small-entity representatives, may waive the requirements of sections (b)(3)–(5) discussed above, but must state in writing the reasons why the panel requirement would not advance the effective participation of small entities in the rulemaking process. The written finding must be included in the rulemaking record.

According to section 609(e)(1)–(3), the factors to be considered in making the finding to waive the panel are:

• In developing a proposed rule, the extent to which EPA (or OSHA) consulted with small-entity representatives with respect to the potential impacts of the rule and took such concerns into consideration.

• Special circumstances requirement prompt issuance of the rule.

• Whether the requirements of section 609(b) would provide the small-entity representatives with a competitive advantage relative to other small entities.

THE FINAL RULE

An agency's analysis of the public record developed in connection with a proposed rule will help it make a determination whether or not the final version of the rule will or will not have a significant economic impact on a substantial number of small entities. If the former, an agency must prepare a final regulatory flexibility analysis. If the latter, then the head of the agency may so certify.

Certification of "No Significant Economic Impact"

Under section 605(b), if the head of the agency concludes that the final rule "will not have a significant economic impact on a substantial number of small entities," then he or she may so certify. The certification must be published in the *Federal Register* at the same time the final rule is published.

The certification must be accompanied by an explanation of the factual basis for the certification. (See page 22 for the Office of Advocacy's views as to what constitutes a "factual basis.") Both the certification and the statement of factual basis must be provided to the SBA's chief counsel for advocacy. Such certifications are judicially reviewable (5 U.S.C. § 611(a)(1) and (2)).

Office of Advocacy Comment: As indicated earlier in the discussion concerning IRFAs versus certifications, the Act requires that the certification appear in either the proposed *or* final rule. (See 5 U.S.C. § 605(b).) Although it is fairly clear that the certification must appear in the final rule if there is no certification in the proposed rule, it is not clear whether the certification must be duplicated in the final rule if it already appears in the proposed rule.

The Office of Advocacy believes that, given the emphasis in the law on public notice, the certification should also appear in the final rule even though there may have already been a certification in the proposed rule. Doing so will help demonstrate the continued validity of the certification after receipt of public comments.

Final Regulatory Flexibility Analysis

As is the case for IRFAs, FRFAs are not required if the agency head certifies the rule and provides a statement of factual basis therefor. However, when an agency promulgates a final regulation that it concludes will have significant economic impact on a substantial number of small entities, section 604(a) of the RFA requires the agency to prepare a final regulatory flexibility analysis (FRFA). Under section 604(b), the agency is required to publish either the FRFA or a summary of the FRFA in the *Federal Register* at the time of publication of the final rule. The agency must also make copies of the FRFA available to the public. FRFAs are judicially reviewable. According to section 605(c), to avoid duplicative action, agencies may consider a series of closely related rules as one rule when preparing a FRFA.

Issues to Be Addressed in a FRFA

The central focus of the FRFA, like the IRFA, is the requirement that agencies evaluate the impact of a rule on small entities and analyze regulatory alternatives that minimize the impact when there will be a significant economic impact on a substantial number of small entities.

The requirements for a FRFA are somewhat different than those for an IRFA. The requirements, outlined in section 604(a)(1)–(5), are listed and discussed below:

1. a succinct statement of the need for, and objectives of, the rule;

2. a summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

3. a description of, and an estimate of the number of, small entities to which the rule will apply or an explanation of why no such estimate is available;

4. a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

5. a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Requirements 2, 3, and 5 are different from the requirements for an IRFA. The emphasis of the discussion below will therefore focus on those three requirements.

Questions to Be Addressed in a FRFA

Questions 1, 3, 4, and 5 appearing in the IRFA discussion of this guide (see page 27) are also relevant questions to consider when preparing a FRFA. The following additional questions should be addressed in preparing a FRFA:

- Have all significant issues raised in the public comments regarding the IRFA been summarized and assessed, and have any changes been made since the publication of the proposed rule as a result of the comments?
- Is it possible to estimate the number of small entities to which the rule will apply? If not, why?
- What steps have been taken to minimize the significant economic impact on small entities?
- Has the statement of factual, policy, and legal reasons for selecting the alternative adopted in the final rule, and the reasons for rejecting other significant alternatives, been included?

Have all significant issues raised in the public comments regarding the IRFA been summarized and assessed, and have any changes been made since the publication of the proposed rule as a result of the comments?

The RFA does not require agencies to address every single comment raised during the public comment period — only the significant ones. The RFA does require agencies to assess (and not just present) the significant comments raised. There is also a requirement to publish in the final rule the specific changes that have been made since publication of the proposed rule in response to the comments. Although there is no requirement to do so, some agencies include in their FRFAs the number of times a particular comment was raised.

Is it possible to estimate the number of small entities to which the rule will apply? If not, why?

There is a requirement to estimate the number of small entities likely to be impacted when preparing and IRFA. There is an additional requirement for FRFAs, however, because agencies must explain why no estimates are available if in fact none are available.

Office of Advocacy Comment: To avoid successful challenges to final rules under the judicial review provisions of the RFA, it is in the best interest of regulatory agencies to construct public records that reflect aggressive and meaningful efforts to compile economic data on the industries/organizational sectors to be regulated and the economic impacts on small entities within those industries/organizational sectors. If such efforts produce inconclusive data or fail entirely, then at least agencies will be able to explain, for the record, why such data were not available.

What steps have been taken to minimize the significant economic impact on small entities?

Agencies may consider and adopt one or multiple alternatives to minimize the burden on small entities. Some of those alternatives may include: lengthening the time for compliance; tiering the compliance requirements based on the size

of the business or degree to which small entities contribute to the problem; providing for exemptions for parts of the rule or the entire rule for small entities; timing compliance to correspond with other statutory deadlines with related requirements; allowing for increased flexibility in the methods used for achieving the agency's objectives (for example, allowing more than one type of air filter to be used to achieve a specified level of air quality); making requirements less prescriptive; etc.

Has the statement of factual, policy, and legal reasons for selecting the alternative adopted in the final rule, and the reasons for rejecting other significant alternatives, been included?

Office of Advocacy Comment: SBREFRA made significant changes to this section of the RFA with regard to compliance requirements.[49] Prior to 1996, an agency needed only to state the alternatives and the reason (or reasons) for rejecting a particular alternative. As result of the amendments, an agency must now include a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule. The agency must also detail for the public record why each of the other significant alternatives was rejected. The changes suggest that it is not enough to say that an alternative was considered and rejected or accepted. There should be significant articulable and supportable reasons for selecting alternatives.

The Office of Advocacy believes the development and consideration of alternatives is likely to be an issue in judicial review of a rule. It is, however, noteworthy that while the FRFA imposes an analytical discipline on regulatory decision-making, it also provides agencies with an opportunity to showcase their expertise by requiring that they provide, for the record, credible substantiation for their rejection of significant alternatives.

Permissible Delays in Publication of a FRFA

Section 608(b) of the RFA provides that an agency may delay, but not waive, the completion of a FRFA if the rule is being promulgated in response to an emergency that makes compliance with the RFA impracticable. When an agency

[49] See 5 U.S.C. § 604(a)(5).

acts under this provision, it must publish its reasons for the delay when it publishes the final rule. Preparation of a FRFA may be delayed for up to 180 days after a final rule is published. If a FRFA has not been prepared within the designated time, the rule will lapse and have no effect.

The rule may not be re-promulgated until the agency completes a FRFA. Agency actions under section 608(b) of the Act are subject to judicial review.

JUDICIAL REVIEW

Arguably, the most significant amendment made by SBREFA to the RFA is the provision that permits judicial review of agency compliance with certain provisions of the RFA. This amendment gives small entities the opportunity to ensure that agencies comply with the analytical processes Congress intended be followed when it enacted the RFA in 1980.

Under the new section 611 added to the RFA, a small entity that is adversely affected or aggrieved by a final agency rulemaking may seek review of the agency's non-compliance with certain provisions of the RFA. The particular provisions of the RFA subject to judicial review are:

- section 601, definitions, including "small business," "small organization" and "small governmental jurisdiction";
- section 604, preparation of final regulatory flexibility analyses;
- section 605(b), certification that a rule will not have a significant economic impact on a substantial number of small entities;
- section 607, agency's description of the effects of the rule or the rule's alternatives as this section relates to agency compliance with preparation of a FRFA (section 604);
- section 608(b), delay of FRFA completion;
- section 609(a), procedures for gathering comments as this section relates to agency compliance with preparation of a FRFA (section 604), and;
- section 610, periodic review of agency rules.

Office of Advocacy Comment: Although IRFAs are not directly reviewable, the importance of a proper IRFA cannot be underestimated. A proper IRFA provides the necessary foundation for a good FRFA. In many instances, an agency cannot develop an adequate FRFA if the IRFA did not lay the proper foundation for eliciting public comments and seeking additional economic data and information on the regulated industry's profile and regulatory impacts. Moreover, without an adequate IRFA, small entities cannot provide informed

comments on regulatory alternatives that are not adequately addressed in the IRFA.

Timely Appeals

A small entity may seek court review under section 611 during the period beginning on the date of final agency action and ending one year later, except where a provision of law requires such action to be initiated within a period shorter than one year.

When an agency delays the issuance of a FRFA, an action for judicial review must be filed within one year after the date the analysis is made available to the public or in a shorter period where specifically prescribed by law.

Judicial Remedies

Section 611(a)(4) provides that in granting relief in an action under the RFA, the court shall order the agency to take corrective action consistent with the RFA and with the judicial review provisions of the APA under Chapter 7 of the APA.[50] Such actions include, but are not limited to, remanding the rule to the agency or deferring the enforcement of the rule against small businesses, unless the court finds the continued enforcement of the rule to be in the best interest of the public. The court also may require the publication of a new IRFA and/or FRFA to remedy non-compliance, stay the effective date of a rule, or grant other relief that it may deem necessary.

[50] See 5 U.S.C. § 701.

CONCLUSION

The introduction to this guide stated that the RFA does not seek preferential treatment for small entities; does not require agencies to adopt regulations that impose the least burden on small entities; and does not mandate exemptions for small entities. Rather, as this guide has illustrated, the RFA:

- establishes an analytical process for determining how public policy issues can best be achieved without erecting barriers to competition, or stifling innovation or imposing undue burdens on small entities; and
- seeks a level playing field for small entities, not an unfair advantage.

This guide is designed to help institutionalize these concepts so that they become part of a regulatory agency's analytical fiber. The SBA's Office of Advocacy hopes that this guide helps to achieve this objective.

Appendix A: The Regulatory Flexibility Act

The following text of the Regulatory Flexibility Act of 1980, as amended, is taken from Title 5 of the United States Code, Sections 601–612. The Regulatory Flexibility Act was originally passed in 1980 (P.L. 96-354). The Act was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121).

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —

(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of

rules on small businesses, small organizations, and small governmental jurisdictions;

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Regulatory Flexibility Act

§ 601. Definitions

For purposes of this chapter —

(1) the term “agency” means an agency as defined in section 551(1) of this title;

(2) the term “rule” means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term “small business” has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term “small organization” means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term “small governmental jurisdiction” means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

(6) the term “small entity” shall have the same meaning as the terms “small business”, “small organization” and “small governmental jurisdiction” defined in paragraphs (3), (4) and (5) of this section; and

(7) the term “collection of information” —

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either —

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

(8) Recordkeeping requirement — The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

§ 602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain —

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain —

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as —

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting require-

ments under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain —

(1) a succinct statement of the need for, and objectives of, the rule;

(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

§ 606. Effect on other law

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

§ 607. Preparation of analyses

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

§ 608. Procedure for waiver or delay of completion

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the

date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

§ 609. Procedures for gathering comments

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as —

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter —

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the

potential impacts of the proposed rule;

(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term “covered agency” means the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor.

(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

(2) Special circumstances requiring prompt issuance of the rule.

(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

§ 610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors —

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall

invite public comment upon the rule.

§ 611. Judicial review

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than —

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to —

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to

grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

Appendix B: About the SBA's Office of Advocacy

The Office of Advocacy of the U.S. Small Business Administration, established by Congress in 1976 under Public Law 94-305, serves a unique role in government. Headed by a chief counsel for advocacy, the Office's mission is to represent the views of small business before federal agencies and Congress. The chief counsel for advocacy also is charged with monitoring federal agencies' compliance with the Regulatory Flexibility Act (5 U.S.C. § 601) and reporting annually to Congress on its implementation. In brief, the office's statutory responsibilities are to:

- examine the role of small business in the economy and its contributions to competition;
- evaluate the financial markets and the credit needs of small business;
- measure the cost of regulations on small businesses using economic research; and
- monitor federal agency compliance with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.

The chief counsel for advocacy is a presidential appointee confirmed by the U.S. Senate. Under the Office of Advocacy's legislative mandate to represent small business views before the Congress and federal policymakers, the chief counsel for advocacy may take (and at times has taken) positions contrary to those of the administration and Congress on matters affecting small businesses.

Three units within the Office of Advocacy carry out its functions: the Office of Interagency Affairs, the Office of Economic Research, and the Office of Public Liaison.

The Office of Interagency Affairs, staffed primarily by attorneys, is active in policy development. Its major responsibility is the review of regulatory proposals from all federal agencies. The Office of Advocacy scrutinizes regulations for their impact on small business and submits formal comments to agencies about their proposed regulations, their economic analyses regarding the economic impacts of these proposed regulations on small business, and the

agencies' compliance with the Regulatory Flexibility Act. In a court of appeals, the Office of Advocacy has the statutory authority under the Regulatory Flexibility Act to file an *amicus curiae* brief.[1] Also pursuant to its statutory authority, the Office of Interagency Affairs prepares an annual report to Congress and the President on federal agencies' compliance with the RFA.[2] In addition to reviewing regulatory proposals, the staff of the Office of Interagency Affairs develop policy proposals and comment on proposed legislation before the Congress.

The Office of Economic Research co-sponsors data collection by agencies such as the Bureau of the Census, the Federal Reserve Board, and the Internal Revenue Service on important small business topics including small-firm characteristics, minority- and women-owned businesses, and small business economic trends. Through the Office of Advocacy, government entities and the general public can access Census data for some 1,200 industries organized by four-digit standard industrial classification (SIC) codes and data for 900 industries on a state-by-state basis by two-digit SIC codes. Another resource made available by the Office of Economic Research is banking data that makes available, for the first time, comprehensive data on banks' lending to small businesses.[3]

The Office of Economic Research also sponsors small business research on subjects such as acquisitions and mergers, competition, employment and training, franchising, regulations, energy, productivity, taxes, and women- and minority-owned businesses. Each year, the Office of Economic Research compiles economic data on small business and information on policy research that is published in *The State of Small Business: A Report of the President*.

[1] See 5 U.S.C. § 612(b), (c).

[2] See 5 U.S.C. § 612(a); for the annual report, see U.S. Small Business Administration, Office of Advocacy, *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act* (Washington, D.C.: U.S. Small Business Administration, 1983–1997).

[3] For the latest edition, see U.S. Small Business Administration, Office of Advocacy, *Small Business Lending in the United States*, report no. PB97-141410 (Springfield, Va.: National Technical Information Service, 1997).

As the outreach branch of the Office of Advocacy, the Office of Public Liaison publishes a monthly newsletter, *The Small Business Advocate*, disseminating it to approximately 10,000 individuals, academicians, trade associations, and others interested in small business issues. The Office of Public Liaison also edits and manages the publication of numerous Office of Advocacy documents such as: *The State of Small Business: A Report of the President*; *Catalog of Small Business Research*; annual implementation reports on the 1995 White House Conference on Small Business; *Small Business Economic Indicators*; and the *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act*.

The Office of Advocacy engages in a wide range of other projects designed to encourage the growth of small businesses. The Office continues to oversee projects such as:

- the implementation of the recommendations of the 1995 White House Conference on Small Business;
- the initiation of an Internet-based investment service, called ACE-*Net*, that is designed to improve small business access to venture capital;
- the development of a model stock purchase agreement that will reduce the costs of negotiated agreements for equity investments in small businesses across state lines; and
- the establishment of a procurement system, called PRO-*Net*, an Internet-based resource that, among other things, makes available to government procurement offices and contractors information about women-owned firms and minority-owned firms that are part of the SBA's 8(a) program.

Additional information about the Office of Advocacy is available from: Office of Advocacy, U.S. Small Business Administration, 409 Third Street, S.W., Washington, DC 20416. Telephone (202) 205-6532; fax (202) 205-6928; Internet home page: *http://www.sba.gov/ADVO/*.

Policy Specialists in the Office of Advocacy

Policy Area	*Policy Advocate*	*Telephone Number*
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Environmental policy	Kevin Bromberg	205-6964
	Damon Dozier	205-6936
Food and drug policy and health-care reform	Shawne Carter McGibbon	205-6945
Industrial and worker safety and health; transportation issues	Sarah Rice	205-6955
Innovation and technology	Terry Bibbens	205-6983
International trade, economic regulations, labor standards	Jennifer Smith	205-6943
Procurement and contracts	[vacant]	205-6929
Tax and pensions	Russell Orban	205-6946
Telecommunications	S. Jenell Trigg	205-6950

Appendix C: Small Business Statistics for Regulatory Analysis

Regulatory analysis is part art and part science. Not only must the right questions be asked, but they must be asked in a way that takes into account the strengths and weaknesses of the various data sources that are available. Understanding these strengths and weaknesses constitutes much of the art of regulatory analysis.

One of the most difficult tasks in preparing an analysis for the Regulatory Flexibility Act is locating statistics on small business. The information in this appendix has been furnished to help federal agencies identify data sources appropriate for regulatory analyses.

An estimated 23.2 million business tax returns were filed in the United States in 1996. Of these, 72 percent were sole proprietors; 22 percent were corporations; and 6 percent were partnerships. About 24 percent of tax returns are filed by about 5.4 million firms with employees; the remainder represent the full- and part-time self-employed. By most size standards issued by the U.S. Small Business Administration, about 99.7 percent of all firms are small and have fewer than 500 employees and less than $25 million in sales or assets.

Ideally, the data used to analyze the costs and benefits of government regulations should be longitudinal microdata for individual firms — that is, data which traces performance of a collection of firms over several years. However, virtually all publicly available data on individual firms is subject to confidentiality restrictions. Individual names and addresses not only cannot be disclosed, but data must also be presented so that individual firm performance cannot be identified or intuited, even by statistical manipulation. Therefore, most government agencies release summary information, grouping data by industry, size, and/or location.

There is a problem associated with using grouped data through time: the firms that make up the group change. Some firms are born while others die. Some firms expand into a higher size cohort, while others decline into a smaller size category. It is difficult, if not impossible, to identify clearly changes to firms

that remain in the group from changes in the composition of the group.

The data sources listed here generally cover statistics on industries' employment, payroll, and receipts. Most data bases available from government sources do not provide financial data, the balance sheet and income statement information that is needed to analyze the cost of regulations. This is the most sensitive type of information and is rarely available even in aggregate form. Profit information also is usually unavailable.

While data such as that reported by the Census Bureau will always lag behind the calendar by two to three years, new data on firm dynamics — especially on firm births and deaths — is now becoming more readily available from both public- and private-sector organizations. In cooperation with private companies such as Wells Fargo Bank, and organizations such as the National Federation of Independent Business and the Gallup Organization, dynamic data files are being developed. The Office of Advocacy's newly created Longitudinal Extended Establishment Microdata set (LEEM) contains data for 1990 to 1995 and is the only public data file measuring firm births and deaths.

This appendix also provides some general information on the available federal data sources and definitions used for business organizations.

Definitions

Various terms are used in data collection. It is important for those who use the data to understand the variations and their subtle distinctions.

Establishments. An establishment is the smallest unit in which business activity is conducted and on which statistical information is collected. The establishment concept makes no reference to either ownership or taxpaying status. Furthermore, establishments may be branches of larger firms and may differ from separately owned and operated businesses of similar size in purchasing power, advertising coverage, management and control systems, technical resources, and access to capital and credit. (Most very small businesses are single

establishments.)

Enterprises. The enterprise or firm concept refers to all establishments owned by a "parent" company. For instance, an enterprise may own subsidiaries, branches, and unrelated establishments. In most instances, it is necessary to use the enterprise concept to study the characteristics of small firms since the ownership issue is critical for assessing the impact of a given policy. About 15 percent of total employment is in small establishments (fewer than 100 employees) owned by larger firms (more than 100 employees). There are 5.4 million enterprises in the SBA Small Business Data Base and 6.6 million establishments in 1995. (To see these data, go to the Office of Advocacy's Web site at *www.sba.gov/ADVO/stats.* Click on "data by firm size.")

Taxpaying Units. The concept of a taxpaying unit refers to the legal organization of a business as a sole proprietorship, partnership, or corporation. Generally, tax data make no precise distinction between establishments and enterprises. This makes comparisons across data sources difficult, particularly for large multi-establishment firms which can file taxes as enterprises, branches (subsidiaries) of a parent enterprise, or consolidated corporations.

The Office of Advocacy's Census-Based Small Business Data Base

Beginning in late 1991, the SBA's Office of Advocacy contracted with the Economic Surveys Division of the Bureau of the Census to produce linked longitudinal data files on an enterprise basis. The data base, an extension of the Census Bureau's Enterprise Statistics program, includes information gathered from 5.4 million enterprises and 6.6 million establishments.

The Office of Advocacy's data files generally include the number of establishments, firms, payroll per firm, and receipts per firm for various size classes based on firm employment size. The data are also broken out by location and/or industry.

Annual cross-sectional files of the raw data were produced for 1988 through 1995. The files are available in hard copy, on floppy disk, and on CD-ROM from Advocacy's Office of Economic Research, telephone (202) 205-6530. Data are generally available at the four-digit SIC code level of industrial detail for the United States overall, and at the two-digit level by state. In addition, 1995 industry data delineated for more than 1,200 industries can be downloaded from the Office of Advocacy's Web site at *http://www.sba.gov/ADVO/*.

Customized tabulations or copies of the data base are available. Inquiries may be directed to Mr. Ken Sausman, chief, Research Programming Branch, Bureau of the Census, at (301) 457-2562. (Because of confidentiality restrictions, no individual names or addresses may be provided.)

Some of these data have already been published in other places besides the Internet, including the data tables compiled by the Office of Advocacy and published in the President's annual economic report, *The State of Small Business: A Report of the President*,[1] Other tables from this data base have been published in the SBA's *Handbook of Small Business Data.*[2]

Job Creation and Employment

Files for the 1989–1991, 1990–1993, and 1991–1995 periods produced by the Bureau of the Census under contract with the SBA's Office of Advocacy are now available. These files represent the first U.S. government data from which job creation and employment can be studied for all industries. Contact Advocacy's Office of Economic Research at (202) 205-6530 for further information. Private-sector job creation and employment data, state by state, is

[1] Executive Office of the President, *The State of Small Business: A Report of the President* (Washington, D.C.: U.S. Government Printing Office, annual). Copies of the latest (1995) edition are available for purchase from the Superintendent of Documents, tel. (202) 512-1800. Stock no. 045-000-00273-0.

[2] U.S. Small Business Administration, Office of Advocacy, *Handbook of Small Business Data*, 1994 ed. (Washington, D.C.: U.S. Government Printing Office, 1994). Available for purchase from the Superintendent of Documents, tel. (202) 512-1800. Stock no. 045-000-00270-5.

also available on the Office of Advocacy's Web site at *http://www.sba.gov/ADVO/stats*.

Characteristics of Small Business Owners and Employees, 1997

A publication of the Office of Advocacy, *Characteristics of Small Business Owners and Employees, 1997*,[3] uses data from two sources: the Census Bureau's Current Population Survey (1993–1996) and the Characteristics of Business Owners 1992 (a survey that was co-funded by the Office of Advocacy). It uses these sources to describe these businesses' sources of capital, their profitability, their employees, and the major industry and home-based status of women and minority business owners. Because 85 percent of the firms covered by the Characteristics of Business Owners survey have no employees, this data source provides some information on potential regulatory impacts on very small firms, particularly their ability to pay for such regulations.

Other Federal Agency Data on Small Firms

Federal Reserve Survey of Small Business Finances. Within the last five years, two major surveys of small firm finances have been conducted by the Federal Reserve Board and the Office of Advocacy. The National Surveys of Small Business Finances (NSSBF) have been the most detailed examination to date of the credit needs of small firms, as well as their sources and uses of funds. These data maybe of use for regulatory analysis when issues relating to capital costs associated with regulations are the issue. In each survey, more than 5,000 small firms with fewer than 500 employees provided detailed answers on their uses of banks and bank services and alternative sources of credit, the difficulties encountered in borrowing or raising expansion capital, and their level of

[3] U.S. Small Business Administration, Office of Advocacy, *Characteristics of Small Business Owners and Employees, 1997*, report no. PB98-127111 (Springfield, Va.: National Technical Information Service, 1998). The text is also available on the Office of Advocacy's Internet site at *http://www.sba.gov/ADVO*.

satisfaction in using each type of service. (Because of data limitations, firms without employees were not included in the two surveys.)

The survey results may be obtained from John Wolken at the Federal Reserve Board, (202) 452-2503. A public Statistical Analysis System (SAS) file is available for purchase.

Census' Characteristics of Business Owners Survey. For the year 1987, and again for the 1992–1994 period, the Minority Business Development Agency of the U.S. Department of Commerce and the SBA's Office of Advocacy contracted with the Census Bureau to produce the Characteristics of Business Owners (CBO) Survey data. The CBO is a survey of 125,000 small firms. To be included in the CBO sampling frame, firms needed $5,000 in sales in each respective year, and had to have filed a tax return.

The CBO is the only nationally representative source of information about many of the subjects covered in the survey: demographic characteristics of the owner and economic characteristics of the firm such as sales, export status, franchise status, hours and weeks worked by the business owner, sources of debt and equity capital, etc. The good news is that this source has important data not available elsewhere; the bad news is that the analyst has to be patient enough to modify the data to meet the regulatory questions under analysis.

Copies of *Characteristics of Business Owners: 1992* are available for purchase from the Superintendent of Documents or U.S. Government Bookstores.[4]

IRS Statistics of Income. Each quarter, the Statistics of Income (SOI) division of the Internal Revenue Service publishes the *SOI Bulletin*. This publication contains data for both households and businesses and is an invaluable source of statistical information. Data on business firms are generally classified by receipt size class for proprietorships, partnerships, and corporations.

[4] U.S. Department of Commerce, Bureau of the Census, *Characteristics of Business Owners: 1992*, CBO-1 (Washington, D.C.: U.S. Government Printing Office, 1997).

Data on business profits from the IRS are elusive. For sole proprietors and partnerships, only data on net income are available. The preferred concept — return on assets or return on investment — is not obtainable directly from the tax return; it is available only from the kind of balance sheet information kept by accountants or from private sources like Dun & Bradstreet's *Dun's Financial Profiles.*

For small business corporations, more data are available. The IRS' *Source Book for Corporations* contains data for corporations by asset size class. Balance sheet and income statement information is available for corporations in about 15 different asset classes. From this detailed data, it is possible to calculate rates of return on assets as well as the profits of small business (generally subchapter S) corporations.

Data on Self-Employed Persons. Each year, the March Current Population Survey of the Bureau of the Census asks a series of expanded questions about self-employed persons as part of its firm-size supplement. These questions include the hours and weeks spent working in the business during the previous year, the income earned, the demographics of the business owner, whether the firm (owner) has or provides benefits, and several related questions about the industry of the firm.

These data are available from the Population Division of the Bureau of the Census at (301) 763-4100.

Private Data Sources

The Kauffman – Ernst and Young Data Base of Fast Growth Companies (KEYFGC) is a promising new data base that relies on data from two sources: the accounting firm of Ernst and Young for employment and sales information, and the Dun & Bradstreet Corporation for financial data. Information currently available on each firm covers four years and includes income statement and balance sheet information.

The major promise of this data is the ability to understand where and how fast growing companies develop over time, including details about their locations and industries. In addition, the KEYFGC data set is one of the only data bases with actual financial data available on individual (but unidentified) companies.

Other Sources

Economic Research on Small Businesses. Over its 20-year history, the SBA's Office of Advocacy has contracted for research on a variety of small business topics. A retrospective listing of these research reports to 1995 is available in the SBA's *Catalog of Small Business Research*.[5] Information on subsequent research efforts of the Office of Advocacy is listed on its Web site at *http://www.sba.gov/ADVO/research/*.

[5] U.S. Small Business Administration, Office of Advocacy, *Catalog of Small Business Research*, 1995 ed., report no. PR-861 (Springfield, Va.: National Technical Information Service, 1995). The National Technical Information Service may be contacted at (703) 605-6000.

Appendix D: Additional Provisions of the Small Business Regulatory Enforcement Fairness Act

In addition to amending the Regulatory Flexibility Act, the SBREFA amends the Equal Access to Justice Act and introduces other key reforms to provide regulatory relief to small entities. Inasmuch as this guide is intended as a road map for RFA compliance, the additional SBREFA provisions below are only discussed briefly.

Equal Access to Justice

Sections 231–233 of the SBREFA amended the Equal Access to Justice Act (EAJA). These provisions expanded the ability of parties in litigation with the government to recover attorney fees under that law. In administrative and judicial proceedings, if the government's demand to enforce a party's compliance with a statutory or regulatory requirement is unreasonable when compared with the judgment or decision, the party may be entitled to attorney fees and other expenses related to defending against the action. Allowable attorney fees were increased from $75 per hour under the older version of the law to $125 per hour.

Small Business Compliance Guidance

Section 212 of the SBREFA requires federal agencies to publish compliance guides for rules with significant small-entity impacts. An agency is required to publish one or more compliance guides to help small entities comply with the rule, for each rule (or related series of rules) requiring a final regulatory flexibility analysis. Agencies should develop the guides in plain and simple language so that they can be easily understood by any small entity that might be affected by the rule. Further, the guides may cover both federal and state requirements.

Agencies should work closely with affected small entities in preparing and distributing the guides. Finally, the SBREFA requires agencies to establish a

system for addressing compliance inquiries from small entities.

An agency's compliance guidance for a particular rule is not subject to judicial review under the SBREFA. However, in a civil or administrative action against a small business for a violation of a particular rule, the content of the agency's written compliance guide or guidance given in response to an inquiry may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages.

Oversight and Enforcement

Section 222 of the SBREFA establishes a process whereby small businesses may register complaints against excessive enforcement actions. The new law requires the administrator of the U.S. Small Business Administration to designate a "small business and agriculture regulatory enforcement ombudsman" and to establish a Small Business Regulatory Fairness Board in each of the SBA's 10 regional offices.

Ombudsman The ombudsman works with federal regulatory agencies and receives comments from small businesses concerning enforcement-related activities conducted by agency personnel. The ombudsman has established a process to receive comments from small businesses on agency enforcement activities and, when appropriate, passes such comments on to the agency for review and response. The ombudsman, based on comments received from small business concerns and from Regulatory Fairness Boards (described below), is required to report annually to Congress on agency enforcement efforts.

Regional Boards. Each Small Business Regulatory Fairness Board advises the ombudsman on small business matters relating to agency enforcement activities and assists the ombudsman with the preparation of the annual report to Congress. The boards are authorized to hold hearings. Board members are small business owners and operators who are appointed by the SBA administrator after consultation with the chairpersons and ranking minority members of both

the House and Senate Committees on Small Business.

Rights of Small Entities in Enforcement Actions

Agencies regulating activities of small entities are required, under section 223 of the SBREFA, to establish a policy or program to provide for the reduction (and, under appropriate circumstances, the waiver) of civil penalties for violations of a statutory or regulatory requirement by a small entity. Agencies had until March 1997 to implement this provision. Under appropriate circumstances, an agency may consider ability to pay as a factor in determining penalty assessments on small entities.

Policies or programs established by agencies should contain conditions or exclusions that may include, but not be limited to:

- requiring a small entity to correct the violation within a reasonable period of time;
- limiting the applicability of the policy to violations discovered through participation by a small entity in a compliance assistance or audit program operated or supported by the agency or a state;
- excluding small entities that have been subject to multiple enforcement actions by the agency;
- excluding violations involving willful or criminal conduct;
- excluding violations that pose serious health, safety or environmental threats; and
- requiring a good-faith effort to comply with the law.

Congressional Review

An agency is required, before a major rulemaking[1] can become effective, to submit to the House, Senate, and comptroller general a report containing the following information:

- a copy of the rule being promulgated;
- a concise general statement about the purpose of the rule, including whether it is a major rule; and,
- the proposed effective date of the regulation.

In addition, the agency is required to include with its report to the comptroller general the following information:

- a copy of the cost-benefit analysis of the rule, if any;
- the agency's actions relevant to sections 603, 604, 605, 607, and 609 of the RFA; and,
- the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995.[2]

Major rules cannot take effect until the end of a 60-legislative-day period that begins on the latter of one of the following dates: (1) when Congress receives the agency's report or (2) when the rule is published in the *Federal Register*. Congress may rescind any such rule by a joint resolution of disapproval within the time designated above, subject to a Presidential veto.

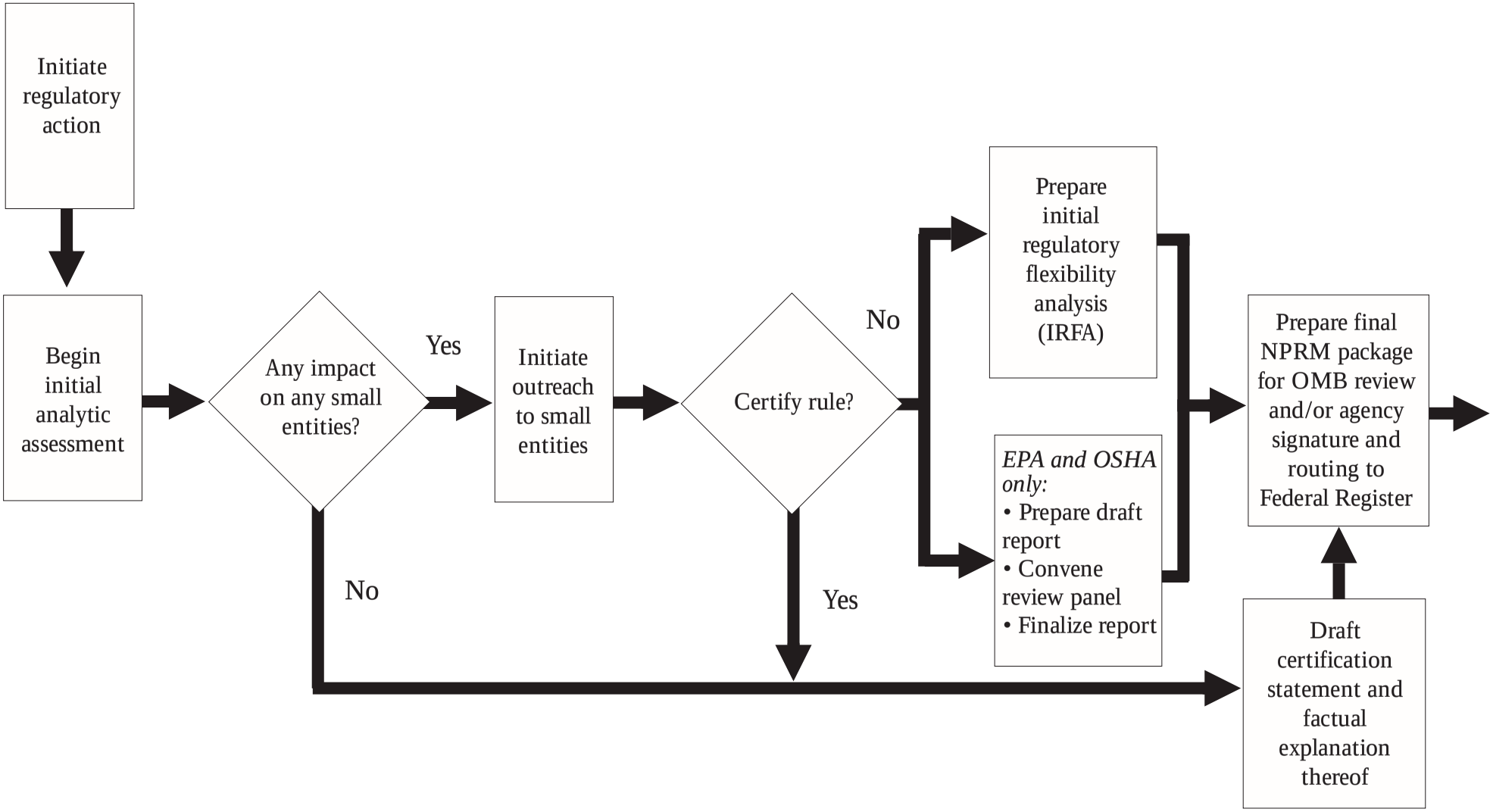
[1] According to the SBREFA, "major rule" is defined as a rule with an impact on the economy of $100 million or more, or a major impact on an industry, government or consumers, or those affecting competition, productivity, or international trade.

[2] 2 U.S.C. § 1501.

Appendix E: Overview of the RFA Analysis Development Process

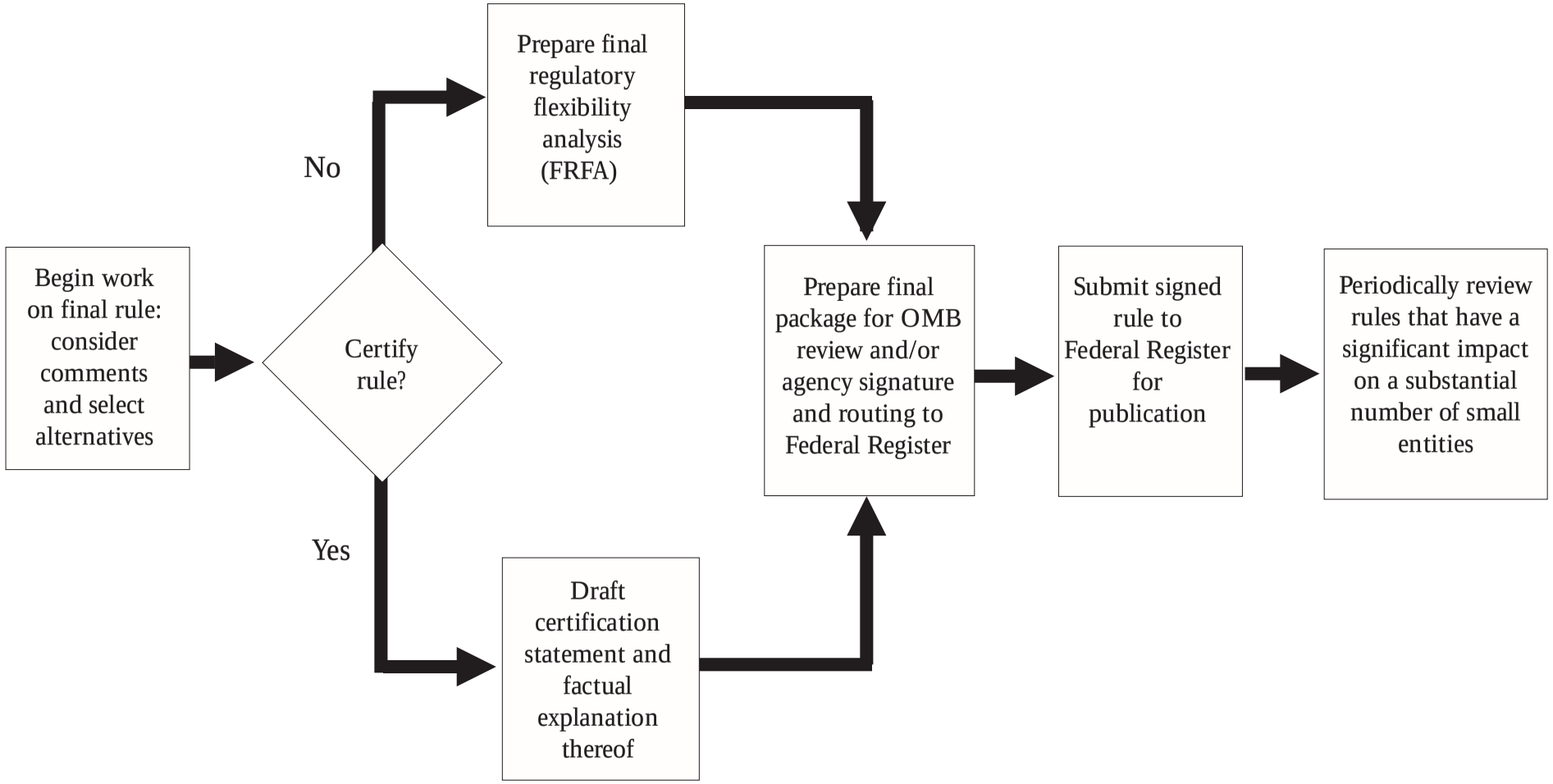
The charts on the following two pages offer a schematic view of the process established by the Regulatory Flexibility Act for analyzing the impact of federal regulations on small entities.

Overview of the RFA Analysis Development Process, Part I



U.S. Small Business Administration, Office of Advocacy.

Overview of the RFA Analysis Development Process, Part II



Note: Under the Small Business Regulatory Enforcement Fairness Act of 1996, additional steps may be required (such as preparation of compliance guides and Congressional review). This diagram only illustrates steps required under the Regulatory Flexibility Act as amended.

U.S. Small Business Administration, Office of Advocacy.